THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION Nos.1699 of 1997 & 19535 of 1999

Dated 01-02-2007

W.P.No.19535 of 1999
Between:
J.V.Surya Rao.

..... PETITIONER

AND

The Industrial Tribunal-cum-Labour Court, Visakhapatnam & another.

.....RESPONDENTS

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WRIT PETITION Nos.1699 of 1997 and 19535 of 1999

O R D E R:

Aggrieved by the award of the Industrial Tribunal-cum-Labour Court in I.D.No.127 of 1992, dated 11-06-1996, whereby the workman was directed to be reinstated into service and a sum of Rs.15,000/- was granted as compensation, the Deputy Executive Engineer has approached this Court by filing W.P.No.1699 of 1997. The workman has filed W.P.No.19535 of 1999 seeking payment of backwages for the remaining extent. Both these writ petitions were heard together and are disposed of by a common order.

The dispute referred by the Government for adjudication of the Industrial Tribunal was "Whether the termination of services of Sri J.V.Surya Rao, workman, by the Deputy Executive Engineer, Gates Erection sub-division, Hiramandalam is justified"?

In his claim statement, the workman contended that he joined as a helper under the Deputy Executive Engineer on a salary of Rs.170/- p.m. from 14-02-1976, that he worked continuously till the end of December, 1981, when his services were terminated and that he was not given one month's notice nor was paid compensation, and as such, his termination was contrary to the provisions of Section 25-F of the Industrial Disputes Act. The workman further contended that his juniors were retained and also some

workers were appointed after his services were terminated. The workman raised a dispute before the Assistant Commissioner of Labour, Srikakulam and, thereafter, the dispute was referred for adjudication before the Tribunal.

In the counter filed before the Tribunal on behalf of the Deputy Executive Engineer, the factum of the workman having worked as helper from 14-02-1976 till the end of December, 1981, that the workman was removed from service without notice and also payment of compensation were specifically denied. It is specifically stated that the workman never worked in the said division as the said division itself was formed only in June, 1977.

The workman examined himself as WW.1 and examined two other workmen as WWs.2 and 3 and also filed Exs.W.1 to W.3. On behalf of the department, the Deputy Executive Engineer, Gates Erection Sub-division, Hiramandalam, was examined as MW.1.

The Tribunal took into consideration the oral deposition of WWs.1 to 3 as also the oral evidence of MW.1 and observed that since MW.1 had joined the sub-division on 12-03-1995, the plea of the workman that the work of erection of gates at Gotta Barriage started even prior to the formation of the sub-division and that he was working prior to the formation of the sub-division could not have been to his knowledge. The Tribunal took note of the deposition of WW.2 that the workman had worked in the project for the relevant time. The Tribunal took note of the contention of WW.1 that he was given muster rolls when he worked as an NMR and drew an adverse inference since the NMR forms were not produced in the Court. The Tribunal held that since these records were in the custody of the department, it was their duty to produce the records in order to deny the claim of the workman and non-production of the records without any reason would necessitate a presumption being drawn that the records, if produced, would show that the workman had worked with the department. The Tribunal held that there was no reason to disbelieve the statement of the workman on oath supported by the evidence of his co-workers that he worked from 14-02-1976 till December, 1981 and the statement of MW.1, who was working with the second respondent from 12-03-1995, who did not have personal knowledge that the workman had worked at the relevant time could not be believed. The Tribunal held that the workman had worked from 14-02-1976 till the end of December, 1981 and that his retrenchment was contrary to Section 25-F of the Industrial Disputes Act. On the quantum of back wages, the Tribunal held that the workman did not approach the Court

a reasonable time, that he had waited till 1988 saying that he had approached the authorities for giving him a job and that the authorities promised to give a job and ultimately failed to give a job, which resulted in his filing I.D.No.419 of 1989, but the I.D. was returned in 1991 on the ground that an application under Section 2-A(2) of the Act was not maintainable and thereafter, he had approached the Assistant Commissioner of Labour and subsequent thereto, the dispute was referred by the Government. The Tribunal noted that there was no statement on oath by the workman that he was not employed elsewhere and held that it was probable that he worked atleast as a labourer on daily wage basis during these years. Taking into consideration the fact that he was drawing Rs.270/- p.m. at the time of his removal, the Tribunal granted compensation of Rs.15,000/- in lieu of back wages.

Learned Government Pleader appearing on behalf of the Deputy Executive Engineer, Gates Erection sub-division, Hiramandalam, would submit that the Tribunal had grossly erred in drawing an adverse interference for the petitioner's inability to produce the nominal muster rolls. She would contend that the burden to prove that the workman had worked for 240 days in a 12 month period prior to his termination was on the workman and that the Tribunal had erred in shifting this burden on to the employer. Learned Government Pleader would draw attention of this Court to the specific plea in the counter filed before the Tribunal, wherein it is stated that the workman had never worked with their division, as also the oral

evidence of MW.1, wherein it is stated that the workman had never worked in the division during the relevant period. Learned Government Pleader would submit that since the workman had never worked in the sub-division, the question of producing NMR forms to show that he did not work did not arise.

Sri V.Sudhakar Reddy, learned counsel for the workman, on the other hand, would contend that the workman had not only examined himself as WW.1, he had also examined two of his co-workers as WWs.2 and 3. Learned counsel would submit that since notice had been issued by the Tribunal calling for the records and since the records were not produced before the Tribunal by the department, the Tribunal was justified in drawing an adverse inference. Learned counsel would submit that nothing more could have been done by the workman to establish that he had worked on daily wage basis during the period 1976 to 1981. Learned counsel would submit that a notice was issued to the Deputy Executive Engineer in 1986 and that the Deputy Executive Engineer had addressed a letter dated 18-05-1986 to the workman, marked as Ex.W.2, asking him to approach their office along with his service certificates. Learned counsel would also place reliance on Conciliation report in Ex.W.1 to contend that since the Deputy Executive Engineer has not specifically raised a plea before the Assistant Commissioner of Labour that the workman had never worked with them, the plea raised before the Tribunal must be held to be inconsistent. Learned counsel would also point out that pursuant to the award of the Industrial Tribunal, the workman had been reinstated into service and was paid compensation of Rs.15,000/- and that, after a long lapse of more than a decade, it would not be proper to throw him out on the streets and that, at least, he be permitted to continue to work on daily wages even if this Court were to come to the conclusion that the award necessitated interference.

As has been held in a catena of judgments of the Supreme Court in **Manager, Reserve Bank of India, Bangalore v. Mani**[1], **Batala Coop. Sugar Mills Ltd. v. Sowaran Singh**[2], **Surendranagar District Panchayat v. Dahyabhai Amarsinh**[3], **Chief Engineer (Construction) v. Keshava Rao (dead) by Lrs.**[4] **Range Forest Officer v. S.T. Hadimini**[5], the burden of establishing that he had worked for more than 240 days in a period of 12 months prior to his termination is on the workman and it is only if this burden is discharged, would the burden shift to the employer. In the present case, the fact remains that the workman, who claims to have worked from 1976 to 1981, for the first time, addressed a letter to the Deputy Executive Engineer in 1986, 4½ years after his alleged termination. Neither the conciliation report marked in Ex.W.1 nor the letter addressed by the Deputy Executive Engineer to the workman in Ex.W.2, contains any admission that the petitioner had worked. All that was stated on behalf of the department before the conciliation officer is that the matter be referred to the Labour Court for its adjudication and that the employer was not inclined to reinstate the workman. In the letter dated 18-05-1986 addressed to the workman, marked as Ex.W.2, all that was stated is that the workman should approach their office along with his service certificates in proof of his having worked in the sub-division during the relevant period.

While it is no doubt true that it is not for this Court in proceedings under Article 226 of the Constitution of India to sit in appeal over findings recorded by the Tribunal nor to re-appreciate the evidence on record, this Court would be justified in interfering if the conclusions drawn by the Tribunal are perverse or are based on no evidence. The law laid down by the Supreme Court in a catena of judgments is that it is the workman who has to establish that he worked for more than 240 days in a period of 12 months preceding his termination. His self-serving oral testimony and the oral evidence of his two co-workers apart, there is no evidence to show that he had ever worked with the employer. A suggestion was put to all the witnesses that the workman had not worked with the department. A specific plea in this regard is also raised in the counter filed before the Tribunal as also in the deposition of MW.1. The department cannot be expected to produce non-existing records to show that the workman had ever worked. While Sri V.Sudhakar Reddy, learned counsel for the workman, would contend that the nominal muster rolls for the relevant period ought to have been produced by the department, it cannot be lost sight of that the workman had raised the dispute

more than 4½ years after his alleged termination. In the absence of any documentary evidence to show that he had worked as an NMR with the department during the period 1976 to 1981, the Tribunal erred in drawing an adverse inference against the employer. The findings of the Labour Court are based solely on the self-serving oral testimony of the workman and two of his co-workers. Since oral evidence could not have been given undue weight in the face of the specific plea by the department in its counter coupled with the oral testimony of MW.1 that the workman had never worked with the department. In the light of these contradictory oral versions and inasmuch as the burden was on the workman to establish that he worked for 240 days, which, he had failed to discharge, the award of the Labour Court is liable to be quashed.

While it is no doubt true that as a result of the order now passed, the workman would be denied even his employment on daily wages though he has been working for the past more than a decade, it is not for this Court to examine all these in certiorari proceedings, for it is only the validity of the award which arises for examination. Needless to state that the order now passed shall not preclude the workman from seeking sympathetic consideration of the department for his being continued in service even if it be on daily wage basis and I have no reason to doubt that on such a request being made, the department would consider the same sympathetically.

W.P.No.1699 of 1997 filed by the department is allowed and W.P.No.19535 of 1999 filed by the workman is dismissed. No order as to costs.

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31-01-2007

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[1] 2005(5) SCC 100

[2] 2005(8) SCC 481

[3] 2005(8) SCC 750

[4] 2005(11) SCC 229

[5] 2002(3) SCC 25